

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

WHITAKER ENGINEERING CONTRACTORS
P.O. Box 910
Santa Margarita, CA 93453

Employer

Docket No. 01-R5D2-3769

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above-entitled matter by Whitaker Engineering Contractors [Employer] under submission, makes the following decision after reconsideration.

BACKGROUND AND JURISDICTION INFORMATION

Employer was the general contractor on an earthquake retrofit and repair of the Huasna River Bridge, located nine miles east of U.S. Highway 101 on Highway 166, San Luis Obispo, California (the site). Techno Coatings, Inc. was its painting subcontractor. Commencing on September 7, 2001, Dan Ford, a representative of the Division of Occupational Safety and Health (the Division), conducted a planned inspection at the site.

On September 7, 2001, the Division issued a citation to Employer alleging a serious violation of section¹ 1598(a) [traffic control], with a proposed civil penalty of \$4,500. The citation identified Employer as the “controlling authority” and “correcting employer.” On that same date Techno Coatings, as the “exposing employer”, was issued a citation alleging a violation of the same safety order.

Employer filed a timely appeal contesting the existence and classification of the violation, its classification, and the reasonableness of the proposed civil penalty.

¹ Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

On July 11, 2002, a hearing was held before an Administrative Law Judge (ALJ) of the Board, in Ventura, California. Matt Bousman, Project Manager, represented Employer. Albert Cardenas, Staff Counsel, represented the Division.

On September 27, 2002 the ALJ issued a decision denying Employer's appeal.

On October 25, 2002, Employer filed a petition for reconsideration. The Division filed an answer on November 25, 2003. The Board took Employer's petition under submission on December 12, 2002.

ISSUES

1. Was Employer subject to a citation for violation of section 1598(a) under the Multi-employer Worksite Regulation?
2. Did the Division establish a violation of section 1598(a)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. Employer was Subject to Citation Under the Multi-Employer Worksite Regulation.

In its petition for reconsideration, Employer maintains that its subcontractor, Techno Coatings—not Employer, was responsible for the safety of its own employees. The Division cited Employer for a violation of section 1598(a) under authority of section 336.10.

Section 336.10 (Multi-employer worksite regulation) reads as follows:

On multi-employer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division:

- (a) The employer whose employees were exposed to the hazard (the exposing employer);
- (b) The employer who actually created the hazard (the creating employer);
- (c) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
- (d) The employer who had the responsibility for actually correcting the hazard (the correcting employer).

Note: The employers listed in subsections (b) through (d) may be cited regardless of whether their own employees were exposed to the hazard.

Based upon an independent review of the record, the Board agrees with the ALJ's finding that Employer was contractually responsible for providing all traffic controls for the subcontractor. As an employer who was responsible for the safety of subcontractor's employees by providing safety controls, Employer was subject to a citation issued under the multi-employer worksite regulation regardless of whether its own employees were exposed to traffic hazards.

2. The Evidence Does Not Establish a Violation of Section 1598(a).

The question presented in this matter and in *Techno Coatings, Inc.*² is whether two Techno Coating employees were working on a bridge without proper traffic controls as required by section 1598(a). In the Decision After Reconsideration in *Techno Coatings, Inc., supra*, the Appeals Board found that the evidence did not establish a violation.

The Board has thoroughly reviewed the record in this case and has determined that it is identical to that scrutinized in *Techno Coatings, Inc., supra*, with regard to all material evidence. Accordingly, the rationale for the holding in *Techno Coatings, Inc., supra*, applies to this matter as well. The Board finds that the Division failed to establish that Employer violated section 1598(a).

DECISION AFTER RECONSIDERATION

Employer's appeal from the citation for a violation of section 1598(a) is granted and the \$4,500 civil penalty is set aside.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: November 17, 2003

² Cal/OSHA App. 01-4607, Decision After Reconsideration (Apr. 16, 2003).